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March 3, 1993

BY HAND

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions, MM Docket No. 92-264

Dear Ms. Searcy:

Enclosed are an original and nine copies of the Reply Comments of Liberty Media Corporation in this proceeding. We would appreciate your assistance in distributing a personal copy of Liberty's Reply Comments to each Commissioner.

Thank you for your assistance in this matter.

Very truly yours,

Robert Hoegle

Robert L. Hoegle

RLH:sss
Enclosures

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 11 and 13	)	MM Docket No. 92-264
of the Cable Television Consumer	)	
Protection and Competition Act of 1992	)	
	)	
Horizontal and Vertical Ownership	)	
Limits, Cross-Ownership Limitations	)	
and Anti-Trafficking Provisions	)	

REPLY COMMENTS
<u>OF LIBERTY MEDIA CORPORATION</u>

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March 3, 1993

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SUMMARY

Section 617 is intended to prohibit a narrow class of transfers -- those which further speculative transactions for the purpose of short-term "profiteering." Recognizing this limited purpose, most commenters suggest reasonable interpretations of Section 617 to permit a variety of transfers in connection with legitimate business transactions. Thus, commenters generally agree that the Section 617(a) holding period should extend only to transfers of controlling interests in cable systems and should be applied in a reasonable manner to MSO transactions. Likewise, most commenters support a common-sense, liberal interpretation of the exceptions to Section 617.

Those local and state regulatory authorities which propose restrictive interpretations of Section 617 make no effort to justify their proposals in terms of the underlying purpose of Section 617. At most, they claim that their expansive and unreasonable interpretations of Section 617 would somehow yield lower rates and improve customer service. However, as numerous commenters recognize, other sections of the 1992 Cable Act directly address those concerns.

Consistent with Congressional intent, the Commission's rules should not expand the authority of local franchising authorities to address cable system transfers. Instead, in order to ensure consistent interpretation and

enforcement of Section 617 and its implementing regulations, the Commission should assume enforcement responsibility. Further, the Commission should limit the information which franchising authorities may require so that information requests under Section 617 do not become a tool available to local franchising authorities to delay indefinitely transfers incident to legitimate business transactions.

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	)	
Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions	)	

REPLY COMMENTS
OF LIBERTY MEDIA CORPORATION

Liberty Media Corporation ("Liberty") submits these Reply Comments in response to selected comments in this proceeding addressing the anti-trafficking issues.[1] The record clearly demonstrates that an overly restrictive interpretation of the three-year holding requirement of Section 617(a) of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") is likely to stifle investment in cable systems and to inhibit efficiency enhancing transactions contrary to the intent of Congress.

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[1] The Commission has extended the time for filing Reply Comments "on the issues of vertical and horizontal ownership limits" until May 12, 1993. See Order, DA 93-233, released February 26, 1993.

I. Section 617(a) Does Not Apply To The Transfer Of Minority Ownership Interests.

Nearly all commenters agree that the three-year holding requirement of Section 617(a) should apply only where a cable operator seeks to transfer a controlling interest in a cable system to a third party. See, e.g., Comments of the New York State Commission on Cable Television ("NYSCCT") at 4 ("the types of transfers subject to the three year holding period are those which result in an outright sale or assignment of a franchise or cable system to a separate independent entity or a transfer which changes control"); Comments of the National Cable Television Association ("NCTA") at 42 ("the Commission should look to whether the transferee's interest enables it to control management and operation of the system and to make policy decisions").

Only the New Jersey Board of Regulatory Commissioners ("NJBRC") appears to argue that the holding requirement should apply to "all transfers of ownership in a cable system" regardless of the size of the interest being transferred.[2] NJBRC Comments at 2. The National Association of Telecommunications Officers and Advisors/ National League of Cities ("NATOA/NLC") reaches essentially the same result by presuming that the transfer of a small ownership interest con-

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[2] NJBRC further states that "the definition of control" should apply to "actual operation, management or intent to do so," but it does not appear that this statement is intended to limit the scope of Section 617(a) to transfers of controlling interests. Id.

stitutes a transfer of control. <u>See</u> NATOA/NLC Comments at 10-11 ("upon a transfer of five percent (5%) or more of the stock or other ownership interests in a cable system, there is a rebuttable presumption that an actual transfer of control has taken place").

These overly restrictive regulatory proposals are inconsistent with the plain language of the 1992 Cable Act. Section 617(a) is limited to the transfer of an ownership interest by a "cable operator," <u>i.e.</u> an entity which either "provides cable service" over the cable system or "otherwise controls or is responsible for...the management and operation of the system." <u>See</u> Section 602(5). Thus, the statute clearly does not extend to transfers of ownership interests in cable systems by investors who neither "provide cable service over" nor control "the management and operation" of the system. Further, Section 617(c)(3) expressly allows "any sale, assignment, or transfer, to one or more purchasers...under common control with, the seller, assignor, or transferor." Consequently, transfers of minority interests must be excluded from the anti-trafficking provisions of Section 617(a). To find otherwise would raise form over substance. Application of the three-year holding requirement where Company A seeks to transfer 25 percent of its stock directly to X, but not where Company A seeks to transfer all of its stock to commonly-controlled Company B in which X holds a 25 percent interest, (the latter transfer being expressly excluded from the holding period by Congress under Section 617(c)(3)) would yield an anomalous and illogical result.

Finally, the record provides no public interest basis for overly restrictive application of the anti-trafficking provisions. No party presents any evidence correlating system transfers with either increased cable rates or deterioration of cable service. Rather, the Commission, the General Accounting Office and the Federal Trade Commission have examined this issue and concluded "that there was little, if any, correlation between the sale of cable systems and higher rates," much less transfers of minority interests in such systems. Comments of Cole, Raywid & Braverman ("CRB") at 2.

In contrast, numerous commenters have demonstrated that an overly broad interpretation of the anti-trafficking provisions would stifle investment in cable and inhibit efficiency producing transactions. See, e.g., Comments of Sandler Capital Management at 2 ("inflexible and overbroad" anti-trafficking regulations will "create a disincentive for investment"); Comments of Corporate Partners at 6 (overly restrictive anti-trafficking regulations "will constrain the capability of the cable television industry to attract funds ...which are essential to maintain and to improve services"); Comments of Time Warner Entertainment Company, L.P. ("Time Warner") Regarding Anti-Trafficking Provisions and Cross-Ownership Limitations at 9 (unreasonably low transfer thresholds "could cause undue disruption in the capital markets available to cable operators by causing needless delays and reductions in investment liquidity, and could limit a failing cable operator's ability to obtain new capital").

In short, having eliminated a similar holding requirement for broadcast licenses because it was contrary to the public interest, the Commission should not interpret Section 617(a) to impose a restrictive holding requirement on the cable industry based on the record in this proceeding. See Time Warner Comments at 3 n.7; Liberty Comments at 39-40.

II. The Exceptions To The Holding Requirement Should Reasonably Address MSO Transfers And Be Interpreted Broadly.

NATOA/NLC argues that "MSO transfers should be subject to the 3-year holding period for each individual system being transferred." NATOA/NLC Comments at 12-13. NATOA/NLC offers no support for its position but merely asserts that such transactions may "enhanc[e] one community while subjecting subscribers to higher rates and lower service in another." NATOA/NLC Comments at 12. Even if a transaction posed such problems, the 1992 Cable Act provides local franchising authorities with the authority to address directly rate and customer service issues. See, e.g., Time Warner Comments at 4 n.8; Liberty Comments at 51. Indeed, other cable regulators acknowledge that "some degree of flexibility is warranted" in MSO transfers such that "the rule need not require that each and every system independently meet the three year test." NYSCCT Comments at 8.

Most commenters suggest that, if more than 50 percent of subscribers to the systems being transferred have been served by the transferor for three years or more, the requirements of Section 617(a) should be satisfied. NCTA Comments at 45; Comments of Viacom International Inc. at 22; Comments of Coalition of Small System Operators ("Small Systems") at 7; Time Warner Comments at 16; CRB Comments at 8. Otherwise, application of the three-year holding requirement to every system in an MSO transfer would "have the unintended effect of thwarting legitimate business transactions and promoting inefficiencies." NCTA Comments at 44. See also Comments of Tele-Communications, Inc. ("TCI") at 50 (application to each system in MSO transfer will "frustrat[e] legitimate transactions or forc[e] divestitures that destroy the scale and scope economies inherent in MSO ownership"); Small Systems Comments at 7 (if every system in an MSO transaction must satisfy three-year rule, MSOs "would have to cease all construction and acquisitions of systems three years in advance of a planned sale...discourag[ing] cable operators from extending service to new areas").

The record in this proceeding also clearly supports a liberal reading of the exceptions to the three-year holding requirement set forth in Section 617(c). No commenter opposes a reasonably broad and practical interpretation of these exceptions, which is consistent with the Commission's public interest analysis leading to the abandonment of a similar three-year holding requirement for broadcast licensees. See Liberty Comments at 39-40; Time Warner Comments at 3 n.7.

Several commenters provide examples of efficiencies and other benefits which might be lost through restrictive interpretations of Sections 617(b) and (c). For example, it may not always be possible or desirable to identify in advance those systems which will be "spun-off" in a multiple system transaction. Significant efficiencies may be lost if a system transfer is prohibited by the three-year rule simply because "the terms of sale" in the original transaction did not expressly "require the buyer to subsequently transfer ownership" of that system. Thus, a more liberal interpretation of the "spin-off" exception would promote efficiency without undermining the "anti-profiteering" purpose of the statute. See, e.g., CRB Comments at 9-11 (including suggestion that "intent to spinoff systems could be demonstrated by" side letters or other evidence outside of the initial purchase agreement).

All parties which address the tax-free transfer exception in Section 617(c)(1) agree with Liberty that the exception permits cash or other "boot." Specifically, these commenters argue that the inclusion of cash or other taxable consideration to equalize the value of the systems being transferred should not destroy the exception to the three-year requirement for tax-free transfers. Even if the Commission were concerned that the use of "boot" may allow parties to circumvent the anti-profiteering purpose of the statute, it could impose a reasonable limit on the value of the "boot" as a percentage of the overall consideration. See, e.g., Time Warner Comments at 22; Liberty Comments at 46. No commenters oppose these suggestions, which clearly would promote efficiency-enhancing transactions without undermining the intent of the statute.

III. The Commission Should Assume Responsibility For Enforcing Its Anti-Trafficking Regulations And Limit The Information Required By Local Authorities.

Certain franchising authorities interpret Section 617 as permitting them to review all transfers of ownership interests in a cable system, regardless of the franchise agreement or state and local laws:

> Transfers of ownership interests in cable systems should be subject to case-by-case review by the franchising authority to determine whether an actual change of working control has occurred.

NATOA/NLC Comments at iii.[3] Moreover, these authorities would require the parties to the transfer to provide "any informa-

[3] As set forth supra at 2-3, NATOA/NLC presumes a transfer of control upon transfer of as little as five percent of the ownership interest in a cable system. NATOA/NLC contends that "all such transfers should be subject to review by the franchising authority" regardless of whether a transfer currently is subject to review under the franchise agreement or applicable state or local law. NATOA/NLC Comments at 10-11.

tion that the franchising authority deems relevant to its inquiry under the statute." _Id._ at 3.

Such franchising authorities apparently intend to seek information beyond that required under franchise agreements or state and local laws:

> The franchising authority should not be limited as to the type or quantity of information it may request, so long as the franchising authority reasonably deems all information requested necessary or appropriate for purposes of the transfer of control proceeding.

_Id._ at 16. Such wide-ranging requests for information would plainly provide franchising authorities with the means to delay indefinitely action on proposed transfers:

> The 120-day time period should begin to run only at such time as the franchising authority notifies the cable operator or the transferee that the information _requested or_ required is sufficient for purposes of the transfer proceedings.

_Id._ at 18 (emphasis added).

The approach advocated by NATOA/NLC is plainly inconsistent with the statute and the legislative intent. First, by clearly stating that the anti-trafficking provisions were not intended to expand the existing scope of local franchising authority involvement in the approval of transfers,[4]

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[4] The legislative history cited by NATOA/NLC in its Comments confirms that the Act confers no new authority on local franchising authorities:

> The Committee does not intend that the 3-year holding period requirement _expand_ or restrict the current rights that any franchise authority may have concerning approval of transfers or sales.

Congress expressed its intent that the Commission, not the local franchising authorities, should enforce the three-year holding requirement. See, e.g., CRB Comments at 19-20 ("There are currently no franchises or local laws which confer upon a franchising authority the power to determine whether a cable operator has satisfied the three year holding period...and any FCC rule that confers this power upon franchise authorities would expand the rights of franchise authorities concerning approval of transfers or sales, contrary to Congress's express intent") (emphasis in original).[5] Thus, the three-year requirement of Section 617(a) does not confer upon local franchising authorities any authority to review and approve transfers which are not already subject to such review and approval under existing franchise agreements and state and local laws.

Second, the scope of information which may be requested by franchising authorities is not limitless under Section 617(e). To allow the franchising authority unfettered discretion in requesting information in connection with a proposed transfer would eviscerate the 120-day limit imposed on

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Cable Television Consumer Protection and Competition Act of 1992, H.R. Rep. No. 628, 102d Cong., 2d Sess. 120 (1992) ("House Report") (emphasis added). See NATOA/NLC Comments at 7.

[5] As Liberty explained in its initial Comments at 48-49, Commission enforcement also is essential to avoid inconsistent interpretations and enforcement of the requirement. See also NYSCCT Comments at 8-9; Comments of Cablevision Systems Corporation at 19-20; NCTA Comments at 53; TCI Comments at 44.

franchising authorities for action on any proposed transfer. _See_ TCI Comments at 57; NCTA Comments at 52; CRB Comments at 24. In addition, the statute states that the 120-day period begins running when the franchising authority is presented with "such information _as is required_ in accordance with Commission regulations and by the franchising authority." Section 617(e) (emphasis added). The franchising authority's information "requirement" must be limited by the provisions of the franchise agreement or state and local law applicable to the transfer at issue. This interpretation is consistent with the legislative intent that the franchising authority receive sufficient information "to begin an evaluation of a request for approval of a sale or transfer" for which approval is required under the franchise agreement or state or local law. _House Report_ at 120. Thus, the Commission should limit the information required by franchising authorities to: (1) a certification of compliance with the three-year holding requirement; and (2) "information specified in the franchise" agreement. _See_ CRB Comments at 23-24.

Conclusion

The Commission should implement and enforce the three-year holding requirement of Section 617(a) in a manner which eliminates "profiteering transactions" but does not impair legitimate and routine transactions and transfers. Consequently, the Commission should limit application of

Section 617 to transfers of controlling interests, construe its exceptions broadly, and assume responsibility for enforcing the statute and its implementing regulations.

Respectfully submitted,

March 3, 1993

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